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No. 87-1631

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION TO SUBMIT BRIEF AS AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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MOTION OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL TO SUBMIT BRIEF AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 42 of the Rules of this Court, the Equal Employment Advisory Council ("EEAC") respectfully moves this Court for leave to file a brief as amicus curiae in support of the Petitioner, Burlington Northern Railroad Company, in this case. The brief is conditionally filed herewith in accordance with Rule 36.1. In support of this motion, EEAC shows as follows:

1. EEAC is a voluntary nonprofit association organized to promote sound approaches to the elimination of discriminatory employment practices. Its membership consists of a broad segment of the employer community in the United States, including individual employers as well as several trade associations which themselves have hundreds of corporate members. The members of EEAC are committed firmly to the principles of nondiscrimination and equal opportunity in employment.

2. Many of the Council's members, and the constituents of its trade association members, are deeply concerned about the problem of drug and alcohol abuse in the nation, and have implemented programs addressing substance abuse in their workplace. Often, these programs include drug and alcohol testing for prospective and/or current employees. In a number of instances, members are government contractors who are required or strongly encouraged by federal contracting agencies to assure that employees working on government projects are drug free.[1]

3. Many members also have collective-bargaining relationships with unions representing their employees, which are regulated under the Railway Labor Act, 45 U.S.C. §§ 151-88 (1982) ("RLA"), or more frequently the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* (1982) ("NLRA"). In some in-

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[1] *See* Mandatory Guidelines for Federal Workplace Testing Programs, *published by* the National Institute on Drug Abuse, Department of Health and Human Services, 53 Fed. Reg. 11970, 11975 ¶ 21 (April 11, 1988) ("any agency may require a contractor to test its own employees following the procedures in the Guidelines by making the requirement a term or condition of the contract.")

stances, these collective bargaining agreements address the issue of substance abuse, including drug and alcohol testing. In other instances, substance abuse programs are carried out lawfully among organized workers, although not addressed directly in applicable contracts.

4. The issues presented in the petition for a writ of certiorari are extremely important to the nationwide constituency which EEAC represents. The Ninth Circuit majority ruled that with regard to urine testing programs, a private railroad worker has the same privacy interest as does a government employee under the Fourth Amendment to the United States Constitution. The Court held further that it cannot be assumed, in the absence of express contractual provisions authorizing urine testing, that private railway workers would grant their employer authority to invade their privacy in ways the government could not. (Pet. App. 11a).[2]

The Ninth Circuit's holding in this regard represents an unprecedented extension of constitutional principles to private, non-governmental action. It suggests incorrectly that private employers are subject in their drug testing and related programs to federal constitutional limitations with regard to personal privacy and search and seizure. If allowed to stand, this ruling could interfere directly with important, on-going substance abuse testing programs, not only as to railroads and airlines, but throughout American industry, both in organized and unorganized workplaces.

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[2] "Pet. App." references are to the Petitioner's Appendix.

In the collective-bargaining context, the ruling also is inconsistent with established principles under both the RLA and NLRA. Even assuming, *arguendo*, that private employees enjoy an expectation of privacy approaching that of government employees, it is well-established that in the course of negotiating and administering collective-bargaining agreements, unions may explicitly or implicitly waive many of their members' rights or privileges. Especially considering that the General Counsel of the National Labor Relations Board has announced that she will regard implementation of a substance abuse testing program for job applicants and current employees as a mandatory subject of bargaining under the NLRA, it is to be anticipated that there have been, and will continue to be, varying degrees of waivers of privacy interests as to drug testing in collective-bargaining throughout the nation. It is clear, therefore, that the Ninth Circuit's ruling could interfere with ongoing labor relations agreements and practices with regard to substance abuse testing.

5. Because of its interest in the issues associated with substance abuse, EEAC, through a closely related foundation funded by its members, sponsored the preparation of a monograph titled "Drug and Alcohol Abuse: A Guide to the Issues" by J. Michael Walsh, Ph.D. and Stephen C. Yohay, published in 1987 by the National Foundation for the Study of Equal Employment Policy. More generally, as a broadly-based national organization, EEAC has filed many amicus briefs with this Court. Some of these cases include *Watson v. Fort Worth Bank & Trust* (No. 86-6139) (decision pending); *School Board of Nassau County v. Arline*, 107 S.Ct. 1123 (1987); and *Connecticut v. Teal*, 457 U.S. 440 (1982).

6. EEAC has sought and received permission from this Court to file briefs in other cases concerning nondiscrimination in employment. *See, e.g., Reichhold Chemicals, Inc. v. Cassino*, 108 S.Ct. 785 (*denying cert.* but granting EEAC's motion to file brief in support); *Marino v. Ortiz*, 108 S.Ct. 586 (1988); *State of Florida v. Long*, No. 86-1685, *cert. granted*, 56 U.S.L.W. 3206 (1987); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982); *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978); and *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978).

7. The written consent of counsel for the Petitioner, Burlington Northern Railroad Company, has been filed with the Clerk of the Court. Counsel for Respondent was contacted, and indicated he would not consent to the filing of this brief, thereby necessitating this motion.

WHEREFORE, the Equal Employment Advisory Council respectfully moves that it be granted leave to file the accompanying brief amicus curiae.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The Equal Employment Advisory Council ("EEAC") respectfully submits this brief as amicus curiae in support of the petition for a writ of certiorari in this case filed by Petitioner, Burlington Northern Railroad Company. This brief is filed contingent upon the granting of the accompanying motion.

INTEREST OF THE AMICUS CURIAE

The interest of the amicus is set forth fully in the accompanying motion.

STATEMENT OF THE CASE

The case arises out of the Burlington Northern Railroad's ("BN") change in the procedure used to detect violations of its Rule G, which provides:

> The use of alcoholic beverages, intoxicants, narcotics, marijuana, or other controlled substances by employees subject to duty, or their possession or use while on duty or on company property, is prohibited. Employees must not report for duty under the influence of any marijuana or other controlled substances, or medication, including those prescribed by a doctor, that may in any way adversely affect their alertness, coordination, reaction, responses or safety. (Pet. App. 15a).

An employee on duty found to be in violation of this rule was subject to suspension or discharge. Although this rule or similar ones have been in effect at BN (and in the industry) for more than 40 years, the collective-bargaining agreement between BN and the Brotherhood of Locomotive Engineers ("BLE") did not address the methods of detecting violations of the rule or enforcing its provisions.

Until 1984, BN had primarily relied upon supervisors to detect, through sensory observation, whether employees appeared to be intoxicated. If a supervisor detected alcohol or drug use by an employee, the individual was asked to take a urine test. Such a request was not made, however, unless there was sufficient evidence to establish "reasonable suspicion" to believe that the employee had violated Rule G. If the employee refused to be tested, he would not be disciplined for the refusal, but he could be disciplined for a Rule G violation on the basis of the supervisor's observation of his intoxication.

In 1984, BN suffered two major train accidents, in which several individuals were fatally injured. In one case, investigation revealed alcohol abuse by an engineer as a possible cause, and in the other, toxicology studies revealed traces of marijuana in the crew members' body fluids. (Pet. App. 16a). Thereafter, BN announced that it would require blood or urine testing following a human factor accident or operating rule violation. Under BN's rules, an employee who refuses to submit to a mandatory urinalysis after being involved in a human factor accident or operating rule violation is subject to discipline for insubordination.

BLE filed suit to enjoin the program. The federal district court found that the urine testing program was "arguably justified" under the terms of an "implied agreement extant between the parties." (Pet. App. 19a). The Court held, accordingly, that it lacked jurisdiction, because the dispute was a "minor" one, appropriate for arbitration before the National Railway Adjustment Board, pursuant to 45 U.S.C. § 153, First (i) of the RLA.

On review, the Ninth Circuit majority held that because the mandatory testing program could result in an employee's discharge, it is a mandatory subject of bargaining under the RLA. The majority then held that the dispute over urine testing could not be a "minor" dispute, largely because it could not be implied that the BLE members would have implicitly agreed to waive the expectations of privacy which, the majority said, they would have enjoyed had they been government employees. Thus, applying its analysis in *Railway Labor Executives' Ass'n v. Burnley*,

839 F.2d 575 (9th Cir. 1988),[1] the Court held that were BN's program operated by a government employer, it would have violated the Fourth Amendment because, in the majority's view, it required testing based on generalized, rather than particularized, suspicion. The majority then reasoned that BN's employees, although employed by a private employer, enjoy the same expectations of privacy as do government employees under the Fourth Amendment. The majority then "decline[d] to assume that BLE members implicitly granted BN the authority to invade their privacy in ways the government could not." (Pet. App. 11a). Accordingly, the district court's decision was reversed.

SUMMARY OF REASONS FOR GRANTING THE PETITION

The Ninth Circuit majority below held that private railroad[2] workers have the same expectation of privacy as do government employees under the Fourth Amendment. The petition should be granted to reverse this determination, for the Fourth Amendment is directed at *governmental* intrusions into privacy, and not at agreements between private parties. *United States v. Jacobsen*, 466 U.S. 109, 133-14 (1984). The ruling injects confusion into the circumstances under which private employers may require job applicants and employees to undergo drug and alcohol tests. Given the importance of this issue, private employers need to have the issue clarified, and their freedom from constitutional limitations affirmed.

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[1] A petition for a writ of certiorari is pending in that case as well (No. 87-1555).

[2] The decision also applies, by implication, to airlines.

The ruling below also contravenes settled federal labor law under both the RLA and NLRA that a union may implicitly waive its members' statutory rights. Indeed, under the RLA, there is a split in the circuits on the precise issue presented by the petition, for the Eighth Circuit has held that such a dispute is a "minor" one under the RLA. *Brotherhood of Maintenance of Way Employees v. Burlington Northern R.R. Co.*, 802 F.2d 1016 (8th Cir. 1986).

Under the NLRA, implied waivers of statutory bargaining rights may be found where a union fails to request bargaining following an employer's notice of intent to alter terms or conditions of employment,[3] or where a union agrees to broad management rights language in a collective bargaining agreement.[4] The General Counsel of the NLRB now views implementation of a drug testing program as a mandatory subject of bargaining. Thus, the issue will be increasingly addressed in contract negotiation and administration, so that waivers of the bargaining right are to be expected as an inevitable consequence of strategic labor relations choices. To hold that such a waiver could never be implied is to say, contrary to federal labor policy, that as a practical matter, drug testing is not a proper bargaining subject. Thus, the decision below creates immense confusion on a number of important issues of national concern. For this reason, this Court should grant the petition and review the decision below.

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[3] *See, e.g., Medicenter, Mid-South Hospital*, 221 NLRB 670 (1975).

[4] *See, e.g., Leroy Machine Co., Inc.*, 147 NLRB 1431 (1964).

REASONS FOR GRANTING THE PETITION

I. REVIEW BY THIS COURT IS NECESSARY BECAUSE THE NINTH CIRCUIT'S DECISION CONTRAVENES THE PRINCIPLE THAT CONSTITUTIONAL LAW DOES NOT GOVERN PRIVATE ACTION, AND THUS INJECTS UNCERTAINTY INTO PRIVATE EMPLOYERS' SUBSTANCE ABUSE TESTING PROGRAMS

As set forth in Judge Alarcon's dissent (Pet. App. 13a), the majority below evaluated whether BN's testing practices were arguably permitted under the parties' implied collective bargaining agreement by first determining whether the post-incident testing procedures prescribed by BN could be undertaken by a government employer. The majority then concluded that if conducted by the government, the tests would violate the Fourth Amendment. Next, the majority held that the post-incident testing procedure is not even arguably justified by the collective bargaining agreement, because it could not be assumed that the BLE members would implicitly grant BN the authority to invade their privacy in ways the government could not.

As Judge Alarcon correctly described it, this was an unexplained, "radical departure from fourth amendment analysis" (Pet. App. 14a), for it is well-settled that the Fourth Amendment is directed at governmental intrusions into privacy interests, and not at agreements between private parties. *United States v. Jacobsen*, 466 U.S. 109, 113-14(1984). *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349-51 (1974); *Greco v. Halliburton Co.*, 674 F. Supp. 1147, 1451 (D. Wyo. 1987) (private drug test concurrent with DOT-required physical exam is not state action).

Private employers throughout the nation have fashioned their substance abuse testing programs on the basis that the circumstances under which they may require employees and job applicants to undergo testing are not limited by federal constitutional concerns. There has been no reason for private employers to be concerned that their employees would be deemed to have an expectation of privacy comparable to government employees. Other considerations, such as state law,[5] collective-bargaining agreements, and employee relations concerns may have operated alone or in combination to limit the circumstances under which employers may require drug or alcohol tests. But there has been no reason for the Fourth Amendment, or a constitutional level of privacy expectations, to be among those concerns.

Thus, the Ninth Circuit's decision at a minimum creates uncertainty where the law appeared to be well-settled. It leaves private employers unclear as to the circumstances under which they may require applicants and current employees to undergo drug and alcohol tests. Moreover, there is nothing in the Ninth Circuit decision which distinguishes between organized and unorganized employees as to the expectations of privacy which the court believes private employees enjoy. Thus, the decision creates confusion as to both union and non-union workforces,

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[5] A number of states have enacted statutes which, to one degree or another, limit the circumstances under which private employers may require applicants or current employees to submit to a drug or alcohol test. *See, e.g.*, Conn. Pub. Act No. 87-551 (1987); Iowa Code § 730.5 (1987); 1987 La. Act 464; Minn. Stat. § 181.950 *et seq.* (1987); Mont. Code § 39-2-304 (1987); R.I. Gen. Laws § 28-6.5-1 (1987); Utah Code § 34-38-1 (1987); and 1987 Vt. Act § 61.

raising questions as to whether the expectation of privacy which the Ninth Circuit perceives may be enforced in arenas other than collective-bargaining.

The confusion is compounded by the fact that what constitutes adequate cause for government employers to conduct drug or alcohol tests under the Fourth Amendment is itself an unresolved question. This Court is about to address the question in the limited context of tests for customs agents in *National Treasury Employees Union v. Von Raab*, 816 F.2d 170 (5th Cir. 1987), *cert. granted*, 56 U.S.L.W. 3590 (U.S. Mar. 1, 1988) (No. 86-1879). It is not at all clear, however, whether that decision will clarify what constitutes cause in the broad range of circumstances in which testing may be required by a private employer.

Although this Court has not yet spoken to the issue directly, it has become widely accepted in private industry that drug or alcohol testing following an industrial accident in all likelihood will satisfy any reasonable requirement for cause, regardless of the source of the requirement, and virtually without regard to how the concept of "cause" is defined. But insofar as the majority below has relied upon its decision in *Railway Labor Executives' Association v. Burnley*, the majority below has called this fundamental issue into question as well.

Many employers test all job applicants, and test current employees where there is some cause, or where suspicion justifies doing so. Other employers test on a random basis, often but not necessarily limiting the program to those employees who perform sensitive jobs, such as those which place employees in a position to affect the safety or security of others. However, all private employers need to know the cir-

cumstances under which testing may be performed; thus, clarification of the ruling below is important. Moreover, it is crucial for this Court to reaffirm that private employers are not subject to Fourth Amendment limitations as to their substance abuse testing programs. Accordingly, the petition should be granted.

II. THE DECISION BELOW CREATES A SPLIT IN THE CIRCUITS UNDER THE RAILWAY LABOR ACT, AND IS INCONSISTENT WITH THE LAW UNDER THE NATIONAL LABOR RELATIONS ACT GOVERNING COLLECTIVE-BARGAINING OUTSIDE THE RAIL AND AIRLINE INDUSTRIES

A. The Eighth Circuit Has Held That Under The RLA, Burlington Northern's Post-Accident Testing Program Is A "Minor" Dispute

The identical question ruled upon below was decided differently by the Eighth Circuit in *Brotherhood of Maintenance of Way Employees v. Burlington Northern R.R. Co.*, 802 F.2d 1016 (8th Cir. 1986). There, the court found that BN's unilateral implementation of the identical urine testing policy did not amount to a "major" dispute under the RLA, and that accordingly, the railroad was not required to bargain with the union prior to implementation. In reaching its decision, the court relied on the fact that employees had been governed by Rule G for many years. It concluded that the parties had acquiesced in certain detection and investigative methods under the rule, and that requiring employees involved in accidents to undergo urine testing amounted only to a refinement of those methods. The court also found that since the railroad had long required employees to undergo periodic medical examinations to assure fitness for duty, without opposition from the union,

the addition of a drug screen was arguably justified by past practice.

This decision reveals a split in the circuits on the important issues under the RLA presented by the petition; this alone provides reason for granting the petition. The Eighth Circuit decision also confirms that apart from whether the court below could properly find acquiesence as a factual matter, a waiver as to drug testing objections may be implied in the appropriate circumstances.

B. Under The NLRA, A Union May Impliedly Waive Its Members' Objections To Substance Abuse Testing

The NLRB has long recognized that a union may waive its statutory rights to bargain over changes in terms and condition of employment. This can occur by inaction (*i.e.*, failing promptly to request bargaining in response to receiving timely notice of an employer's plan to alter a term or condition of employment),[6] or by agreement to a contractual revision or management practice which arguably gives the employer the right to take the action in question.[7]

For example, in *Medicenter, Mid-South Hospital, supra*, the employer gave the union notice of its intent to require employees to submit to polygraph examinations. The union protested, but did not bar-

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[6] *See, e.g., Clarkwood Corp.*, 233 NLRB 1172 (1975); *Medicenter, Mid-South Hospital*, 221 NLRB 670 (1975); *Coppus Eng'r Corp.*, 195 NLRB (1972); *Triplex Oil Refinery*, 194 NLRB 500 (1971). *See also NLRB v. Alva Industries, Inc.*, 369 F.2d 310 (8th Cir. 1966).

[7] *See, e.g., Leroy Machine Co., Inc.*, 147 NLRB 1431 (1964).

gain, although the employer was ready to do so. The NLRB found that the union had waived its right to bargain over the decision. In *Leroy Machine Co., supra,* the NLRB found that requiring employees to submit to a physical examination constituted a mandatory subject of bargaining. Nevertheless, the Board found that the union had waived its right to bargain over the implementation of this policy because it had agreed to a management-rights clause which provided, *inter alia,* that the employer had the "sole right to . . . determine the qualifications of employees." This language, the Board ruled, gave management the right unilaterally to require employees to take physical examinations.

The General Counsel of the NLRB announced in a September, 1987 memorandum to the NLRB's Regional Directors that she will regard implementation of drug and alcohol testing, both for job applicants and current employees, as a mandatory subject of bargaining.[8] The memorandum also states that the General Counsel will take the position that management rights clauses in collective-bargaining agreements will not be construed as waivers of the bargaining right.

The General Counsel's position in this regard, while to date not addressed in a decision by the NLRB, assures that in organized workplaces, the issue of drug testing will be placed squarely in the collective-bargaining arena. Depending on the interplay of the numerous factors which govern the decisions which

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[8] NLRB General Counsel's Memorandum GC 87-5 (September 8, 1987), *reprinted in* BNA Daily Labor Report, D-1 (September 24, 1987).

unions and employers make in negotiating and administering labor agreements, it may well be that a union decides to waive, either explicitly or implicitly, the employees' objections to a drug testing program. To hold that such a waiver could never be implied is to say, in a real sense, that the matter is not one open to collective-bargaining. Such a result plainly is inconsistent with settled labor law, and would contravene federal labor policy expressed in the NLRA favoring the voluntary adjustment of labor-management disputes. *See Railway Labor Executives' Ass'n v. Consolidated Rail Corp.*, —— F.2d —— (3d Cir. Apr. 25, 1988).

CONCLUSION

For these reasons, and those expressed by Petitioner, EEAC respectfully submits that the petition should be granted.

Respectfully submitted,

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